

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

JANUARY TERM, 1907.

No. 1750.

471

VIRGINIA-CAROLINA LUMBER COMPANY, A CORPORATION,
APPELLANT,

vs.

FRANK J. EISINGER AND WALTER G. EISINGER, CO-
PARTNERS, TRADING AS EISINGER BROTHERS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED JANUARY 14, 1907.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

JANUARY TERM, 1907.

No. 1750.

VIRGINIA-CAROLINA LUMBER COMPANY (A CORPORATION), APPELLANT,

vs.

FRANK J. EISINGER AND WALTER G. EISINGER, CO-PARTNERS, TRADING AS EISINGER BROTHERS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

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In the Court of Appeals of the District of Columbia

No. 1750.

VIRGINIA-CAROLINA COMPANY, a Corporation, Appellant,
vs.
FRANK J. EISINGER ET AL.

a Supreme Court of the District of Columbia.

At Law. No. 48696.

VIRGINIA CAROLINA LUMBER COMPANY, a Corporation under the
Laws of the State of Virginia,
vs.
FRANK J. EISINGER and WALTER G. EISINGER, Co-partners, Trad-
ing as Eisinger Brothers.

Be it remembered, That in the Supreme Court of the District of
Columbia, at the City of Washington, in said District, at the times
hereinafter mentioned, the following papers were filed, and pro-
ceedings had, in the above-entitled cause, to wit:

1 *Declaration, etc.*

Filed July 26, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 48696.

VIRGINIA CAROLINA LUMBER COMPANY, a Corporation under the
Laws of the State of Virginia,
vs.
FRANK J. EISINGER and WALTER G. EISINGER, Co-partners, Trad-
ing as Eisinger Brothers.

1. The plaintiff, Virginia Carolina Lumber Company, a corpora-
tion under the laws of the State of Virginia sues the defendants,
Frank J. Eisinger and Walter G. Eisinger, co-partners trading as
Eisinger Brothers, for money payable by the defendants to the plain-
tiff for that heretofore to wit on April 20th, 1905 the plaintiff sold
and delivered to the defendants, at the latters' special instance and
request, goods wares and merchandise to the value of Two hundred

thirty dollars and twelve cents (\$230.12); said goods, wares and merchandise being more particularly described in the annexed particulars of demand, marked Exhibit "A." That the defendants promised to pay to the plaintiff for said goods, wares, and merchandise, the sum of Two hundred thirty dollars and twelve cents (\$230.12) and that although often demanded, the defendants have not, nor has anyone for them, paid the said sum or any part thereof.

Wherefore the plaintiff claims Two hundred Thirty dollars and twelve cents (\$230.12) besides costs.

2 2. The plaintiff, Virginia Carolina Company, a corporation under the laws of the State of Virginia sues the defendants, Frank J. Eisinger and Walter G. Eisinger, co-partners trading as Eisinger Brothers for other money payable by the defendants to the plaintiff; for goods sold and delivered by the plaintiff to the defendants; for work done and materials provided by the plaintiff for the defendants at their request; for money lent by the plaintiff to the defendants; for money paid by the plaintiff for the defendants at their request; for money received by the defendants for the use of the plaintiff; and for money found to be due from the defendants to the plaintiff on accounts stated between them.

Wherefore the plaintiff claims Two hundred thirty dollars and twelve cents (\$230.12) besides costs.

H. WINSHIP WHEATLEY,
Attorney for Plaintiff.

Notice to Plead.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of service hereof, otherwise judgment.

H. WINSHIP WHEATLEY,
Attorney for Plaintiff.

3

Affidavit.

In the Supreme Court of the District of Columbia.

At Law. No. —.

VIRGINIA CAROLINA LUMBER COMPANY, a Corporation under the
Laws of the State of Virginia,

vs.

FRANK J. EISINGER and WALTER G. EISINGER, Co-partners, Trading as Eisinger Brothers.

STATE OF VIRGINIA, *City of Lynchburg, ss:*

Richard T. Yates, being first duly sworn on oath deposes and says that he is the President of the Virginia Carolina Lumber Company, a corporation under the laws of the State of Virginia, which corporation is the plaintiff in the above entitled suit. That he has

personal knowledge of the matters herein stated and is the duly authorized agent of the plaintiff for the purpose of this affidavit. That he has read the declaration hereto attached and the facts stated therein are true. That the defendants, Frank J. Eisinger and Walter G. Eisinger, co-partners trading as Eisinger Brothers, are justly indebted unto the plaintiff in the sum of Two hundred thirty dollars and twelve cents (\$230.12). That the said indebtedness is for goods, wares and merchandise sold and delivered by the plaintiff to the defendants, at the latters' request, on April 20, 1905, the said goods, wares and merchandise being more particularly described in the annexed particulars of demand, marked Exhibit "A." That said goods, wares and merchandise were of the value of Two hundred thirty dollars and twelve cents (\$230.12) and the defendants promised to pay to the plaintiff for said goods, wares and merchandise the said sum of Two hundred thirty dollars and twelve cents (\$230.12). That although often demanded, the defendants have not, nor has anyone for them paid the said sum or any part thereof and there is now due and owing by the defendants to the plaintiff the sum of Two hundred thirty dollars and twelve cents (\$230.12) exclusive of all set-offs and just grounds of defense.

RICHARD T. YATES.

Subscribed and sworn to before me this 25th day of July, A. D. 1906.

[SEAL.]

JNO. M. OTEY,
Notary Public.

(By the Laws of Virginia no Tax is required upon the Seal hereto affixed.)

5

EXHIBIT "A."

In the Supreme Court of the District of Columbia.

At Law. No. —.

VIRGINIA CAROLINA LUMBER COMPANY, a Corporation under the
Laws of the State of Virginia,

vs.

FRANK J. EISINGER and WALTER G. EISINGER, Co-partners, Trading as Eisinger Brothers.

April 20, 1905.—4/4 Common Sheathing, D 2 S to 13/16" thick,
16437' \$14.00 \$230.12.

Defendants' Pleas and Affidavit.

Filed August 3, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 48696.

VIRGINIA-CAROLINA LUMBER COMPANY, a Corporation, Plaintiff,
vs.

FRANK J. EISINGER ET AL., Defendants.

The defendants, for plea to the plaintiff's declaration filed herein, say:

First. That they are not indebted as therein alleged;

Second. That they did not promise as therein alleged; and

Third. That the plaintiff, at the commencement of this suit, was, and still is, indebted to the defendants in the sum of one hundred and fifty-seven dollars and eighty-five cents (\$157.85), for that the defendants, at the plaintiff's request, paid the sum of sixty-seven dollars and forty-seven cents (\$67.47) freight on one carload of lumber shipped by the plaintiff to the defendants, April 20, 1905, and the further sum of sixteen dollars and forty-four cents (\$16.44) for hauling said lumber; and defendants claim the further sum of seventy-three dollars and ninety-four cents (\$73.94) for storage of said lumber for fifteen (15) months, at the rate of thirty (30) cents per thousand feet per month, as appears by the particulars
7 of said indebtedness hereunto annexed; and the defendant is willing that the same may be set off against the plaintiff's demand.

HAYDEN JOHNSON,
Attorney for Defendants.

DISTRICT OF COLUMBIA, ss:

Walter G. Eisinger, being first duly sworn, deposes and says that he is one of the parties named as defendants in the above-entitled cause, wherein the Virginia-Carolina Lumber Company, a corporation, is named as plaintiff, and Frank J. Eisinger and affiant as co-partners, trading as Eisinger Brothers, are named as defendants; that as such defendant he has knowledge of the facts and circumstances out of which the alleged cause of action counted on in plaintiff's declaration and accompanying affidavits arose. He denies the right of the plaintiff to recover in said action the amount claimed therein, and he further denies that his firm is indebted to the said plaintiff in any amount whatever. That the facts and circumstances out of which the plaintiff's alleged claim arose are as follows:

During the month of April, 1905, affiant's firm, which is and was at that time engaged in the retail lumber business in this city, ordered from the plaintiff corporation, which is and was at that

time engaged in the wholesale lumber business, three (3) carloads of edge box boards, of the value of fourteen dollars (\$14) a thousand; that on April 20, 1905, and after receiving the order of affiant's firm, the plaintiff shipped to affiant's firm one carload of edge sheathing of the value of about eight dollars (\$8) a thousand feet; that affiant immediately, to wit, on April 28, 1905, notified the plaintiff that the goods received by them were not those ordered, and that they would hold said goods subject to the order of the plaintiff, upon the payment by the plaintiff of the charges thereon; that affiant's firm paid, on account of freight on said carload of lumber, the sum of sixty-seven dollars and forty-seven (\$67.47); that they paid sixteen dollars and forty-four cents (\$16.44) for hauling and unloading said lumber, and it was understood between the plaintiff and affiant's firm that such charges should be paid by the plaintiff. That in response to said notification, affiant received the following letter from the plaintiff:

"Messrs. Eisinger Brothers, Washington, D. C.:

Your favor of the 28 received just as the writer is leaving for South Carolina, and I will take this matter up with you further upon my return home in about a week. In the meantime we trust you will look around and see if you cannot find a customer for the stock that will let us out on same. Your second car has probably been shipped, but we will take the matter up by wire as soon as we get the car number and endeavor to divert it.

Yours truly,

VIRGINIA-CAROLINA LUMBER CO.
RICHARD T. YATES."

That affiant did endeavor to secure a purchaser for said lumber, but was unsuccessful, and notified the plaintiff that they held said lumber subject to the order of the plaintiff. That plaintiff never took any steps toward taking away his lumber, and in consequence of this affiant's firm has been compelled to store the same in his lumber-yard, where it now is, for a period of fifteen (15) months, said lumber occupying a ground space of 8 x 16 feet.

Affiant further says that his firm is entitled, in addition to the freight and hauling paid by them on account of said lumber, to recover from the plaintiff the sum of thirty (30) cents a thousand feet per month for the storage of said lumber, such charge being the usual charge for storage in such cases.

Wherefore, the affiant denies that his firm is indebted to the plaintiff in the amount claimed, or in any amount, but further says that the plaintiff is indebted to his firm in the sum of one hundred and fifty-seven dollars and eighty-five cents (\$157.85), being the sum of the hauling and the storage charges as aforesaid, exclusive of all set offs and just grounds of defense.

WALTER G. EISINGER.

Subscribed and sworn to before me, this 3rd day of August, 1906.
[SEAL.]

WM. H. HOLLOWAY,
Notary Public, D. C.

10

Joinder in Issue.

Filed August 7, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 48696.

VIRGINIA-CAROLINA LUMBER COMPANY, a Corporation,
vs.

FRANK J. EISINGER ET AL.

The plaintiff joins issue upon the defendant's pleas.

H. WINSHIP WHEATLEY,
Attorney for Plaintiff.

Mr. Hayden Johnson, Attorney for Defendant.

DEAR SIR: Please take notice that the issues framed in this cause will be tried at the next term of Court.

H. WINSHIP WHEATLEY,
*Attorney for Plaintiff.**Memorandum.*

November 14, 1906.—Verdict for defendants for \$67.47.

11

Supreme Court of the District of Columbia.

FRIDAY, November 23, 1906.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * *

At Law. No. 48696.

VIRGINIA-CAROLINA LUMBER COMPANY, Pltf.,

*vs.*FRANK J. EISINGER and WALTER G. EISINGER, Co-partners, Trading
as Eisinger Brothers, Def'ts.

Upon hearing the plaintiff's motion for a new trial, it is considered that the same be, and hereby is overruled, and judgment on verdict ordered;

Therefore it is considered that the defendants recover against the plaintiff the sum of Sixty seven and 47/100 dollars (\$67.47) with interest thereon from this date, being the money payable by it to the defendants by reason of the premises, together with the costs of suit, to be taxed by the Clerk, and have execution thereof.

The plaintiff notes an appeal to the Court of Appeals, and the

penalty of the bond to act as a Supersedeas is fixed in the sum of One hundred and forty dollars (\$140.) or the bond for costs at One hundred dollars (\$100.).

12

Memorandum.

November 27, 1906.—Appeal bond filed.

Supreme Court of the District of Columbia.

FRIDAY, *December* 21, 1906.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * *

At Law. No. 48696.

VIRGINIA-CAROLINA LUMBER Co., Pltf.,

vs.

FRANK J. EISINGER and WALTER G. EISINGER, Co-partners, Trading as Eisinger Brothers, Def'ts.

Now comes here the plaintiff by its Attorney and prays the Court to sign, seal and make part of the record, its bill of exceptions taken during the trial of this cause (and heretofore submitted) now for then, which is accordingly done.

13

Bill of Exceptions.

Filed December 21, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 48696.

VIRGINIA-CAROLINA LUMBER Co., a Corporation,

vs.

FRANK J. EISINGER and WALTER G. EISINGER, Co-partners, Trading as Eisinger Brothers.

Be it remembered that upon the trial of this case before Mr. Justice Wright and a jury the following and no other evidence was submitted to the Court and the jury.

RICHARD T. YATES, witness on behalf of the plaintiff, was sworn and testified as follows: that he was the President of the Virginia-Carolina Lumber Company; that about the 1st day of April, 1905, the Virginia-Carolina Lumber Company wrote their first letter to Eisinger Brothers. Counsel for plaintiff called upon counsel for the defendants for a copy of said letter, to which counsel for defendants

replied that he did not have it. Witness then stated that he made a copy of said letter but that he could not find it. He further stated that he offered Eisinger Brothers a lot of common sheathing, or edge box boards dressed on two sides to 13/16" thick, quoting them a price on same of Fourteen (14) dollars per thousand feet delivered f. o. b. Washington, D. C. Witness stated that

14 he had received a letter April 6, 1905, from the defendants in reply. The signature of said letter being admitted by all parties the said letter was put in evidence and read to the jury, as follows:

"WASHINGTON, D. C., April 6, 1905.

Virginia-Carolina Lumber Co.

GENTLEMEN: Your favor of the 5th to hand, offering 2 to 3 cars D 1 S sheathing at \$14.00 delivered.

This is the price we are paying for good sound edge box D 1 S. We can get the red heart and mill cull sheathing for \$12.50.

If what you have to offer is good sound regular edge box, we will try a car or two of it, but if it is the red heart and mill cull kind, we don't want it.

If this is all right and you conclude to ship us a car, we would like it to come via B. & O. to New York Ave. yard.

Very truly yours,

EISINGER BROS.
W. G. E."

Witness identified a letter of April 8, 1905, written by the plaintiffs to the defendants, and the signature of same being admitted by all parties the same was put in evidence and read, as follows:

15

"APRIL 8, 1905.

Messrs. Eisinger Bros., Washington, D. C.

GENTLEMEN: Your favor 6th inst. received in regard to the sheathing offered you. We beg to advise that our sheathing is D. 2 S. to 13/16" thick and is what we call common edge or cull sheathing, but think it better quality than what is generally known as Red hearts. As a matter of fact, our sheathing is culls from pine boards. We have shipped considerable quantities of same to Washington and the price that we are getting for it now is the same as named you and we have never had a single complaint about same. In order to make a beginning with you, you might take a small car load as a trial and if not satisfactory, we could not expect to sell you more of the stock. You will understand that it is D 2 S., not one side as stated in your letter. We do not know whether we can make delivery via B. & O. to New York Avenue Yard but will take this up with the R. R. people. Our shipments heretofore for your city, have been consigned to 14th Street yard.

Yours truly,

VIRGINIA-CAROLINA LUMBER CO."

Witness stated no reply was received to plaintiff's letter of April 8, 1905, and on April 14, 1905, plaintiff again wrote to defendants,

witness identifying letter of April 14, 1905, by the plaintiff to the defendants, which was offered in evidence as follows:

16 "LYNCHBURG, VA., April 14, 1905.

Messrs. Eisinger Bros., Washington, D. C.

GENTLEMEN: We have been expecting to hear from you in answer to our letter of 8th as we have on hand a car load of sheathing that we would be glad to ship you as a trial. Please advise upon receipt of this letter whether you can handle it.

Yours truly,

VIRGINIA-CAROLINA LUMBER CO.
RICHARD T. YATES.

D. Y.

We understood that you would send us this one car as trial. Let it come. If possible, make delivery via B. & O. to N. Y. Ave. Yard.

EISINGER BROS.
W. G. E."

Witness stated defendants returned the letter to plaintiff with the notation on the bottom of same as shown above, the signature to which notation was admitted by all parties.

Witness further stated that the car load of lumber mentioned was loaded at Sumter, S. C. in Atlantic Coast Line car No. 22385, that he had examined the lumber before it was shipped, or nearly all of it, and that it was what was known as common sheathing or might be called edge box boards or common edge or cull sheathing. Witness stated he had been in the lumber business for thirteen years, that these were terms used in the lumber trade and
17 expressed to any lumberman a certain quality of lumber which was of a very low grade. Witness stated he inspected most of the lumber before it was loaded into the car and it was exactly what was ordered, and that the lumber that was placed in the car was common edge or cull sheathing, that it was a better grade of lumber than what they agreed to sell Eisinger Brothers, in fact, he stated, it was a better grade of lumber than what is usually termed by the names mentioned herein; that they had made a special effort to give satisfaction in this deal.

Witness stated that this lumber was shipped from Sumter, S. C. and they heard nothing from the defendants until the receipt of defendants' letter under date of April 28, 1905; the signatures to said letter were admitted by all parties and the same was read in evidence as follows:

"WASHINGTON, D. C., April 28, 1905.

Virginia-Carolina L. Co.

GENTLEMEN: Car 22385 with D 1 S. sheathing just in, and are sorry to have to report that this kind of lumber will not do us at all. We have better lumber right now in our yard, that was bought for red ht., and for which we only paid \$11.50, and we are compelled

to tell you frankly that this car you have sent us is by far the worst we have had here in a long time and is not worth any more to us than the red heart we have.

18 We will therefore have to cancel our order for the other 3 cars, which we gave your Mr. Dunnigan provided this sample car was satisfactory. If you can send us some good sound edge box—all right, but we can not use any more like sample, unless you can make price \$11.50.

Yours truly,

EISINGER BROS.
W. G. E."

Witness also identified as having been received by his company another letter of April 28th, signed by the defendants, the signatures to which were admitted by all parties, and the letter was put in evidence and read as follows:

" WASHINGTON, D. C., *April 28, 1905.*

Virginia Carolina L. Co.

GENTLEMEN: Since writing you yesterday in reference to car of D 1 S. sheathing just in, we find on further inspection that — is far worse than what we first thought, and will have to decline it altogether. We cannot use this kind of lumber at any price.

We have hauled the car and have it piled in our yard subject to your order upon the payment of charges.

Very truly yours,

EISINGER BROS.
W. G. E."

19 F. M. DUNNINGTON, witness, sworn on behalf of the plaintiff, testified as follows:

That he was the Secretary-Treasurer of the plaintiff company and had been in the lumber business for three years. He knew the trade names used in said business, that the words "common sheathing" was a technical term used in the lumber business and conveyed to a lumberman's mind a quality of lumber; also that the words "common edge or cull sheathing" were terms used in the lumber business and conveyed to a lumberman's mind a quality of lumber.

The depositions of J. W. Jackson and Jackson Jenerette, witnesses on behalf of the plaintiff, were then read in evidence, the substance of which was to the effect that they had examined the lumber herein mentioned above before it was shipped to Eisinger Brothers, and that the same was common sheathing as herein mentioned, and of good quality.

Whereupon plaintiff rested.

On behalf of the defendants, WALTER G. EISINGER, one of the defendants, being called and first duly sworn, testified in substance as follows:

That he was one of the defendants, and he examined the lumber sent, and the same was not common sheathing; that he had written the letters heretofore mentioned and testified to by the plaintiff's witnesses. Mr. Eisinger identified the following letters, and the signatures to same being admitted by both sides, they were read and put in evidence.

20 "APRIL 28, 1905.

Messrs. Eisinger Bros., Washington, D. C.

GENTLEMEN: Your favor of the 28th instant received in reference to car 22385, and we regret very much indeed to note that this stock is not satisfactory. Of course we represented it as being a very common grade of stuff, but at the same time we had no doubt you would find it to be satisfactory as we had been shipping practically our entire output of sheathing (several hundred thousand feet) to Washington for the past six or eight months and have never had any complaints against it, as our customers expected low grade and they undoubtedly regarded it as good value for the money, otherwise, would not have bought it. We are selling other parties in your city at the same price and they are undoubtedly handling same to advantage; otherwise, would not buy it. We have no doubt after handling this stock you will find it profitable.

In regard to canceling your order for the three cars placed with our Mr. Dunnington, we have telegraphed this to the mill, and we expect that one car has already been shipped, and we will thank you upon receipt of this letter to telegraph us, at our expense, if you cannot possibly see your way clear to handle this, and we will endeavor to divert it. It will be consigned to New York Avenue Yard, via B. & O. delivery, and if you cannot handle it we
21 wish to divert it to some other point. Possibly you will find the sheathing to be a better quality after getting into it.

Regretting this dissatisfaction very much, we are,

Yours truly,

VIRGINIA-CAROLINA LUMBER CO."

"APRIL 29, 1905.

Messrs. Eisinger Bros., Washington, D. C.

GENTLEMEN: Your favor 28th received. The writer is leaving for South Carolina and I will take this matter up with you further upon my return home in about a week. In the meantime we trust that you will look around and see if you cannot find a customer for the stock that will let us out on same. Your second car has probably been shipped, but we will take the matter up by wire, as soon as we get the car number, and endeavor to divert it.

Yours truly,

VIRGINIA-CAROLINA LUMBER CO."

Witness testified that no further correspondence occurred between plaintiff and the defendants between the time of the letters herein mentioned and August 24, 1905.

"AUGUST 24, 1905.

Eisinger Bros., Washington, D. C.

22 GENTLEMEN: Enclosed please find statement for A C L car #22385. You will recall there was some complaint in this shipment, but will state that this stock came from one of our mill connections and we have shipped a great deal of this stock to your city and it has given entire satisfaction. No doubt in view of the unusual demand for lumber since this car was shipped you, you have been able to dispose of this stock. We would thank you to let us have check and freight bill in settlement as we have some heavy payments to meet within the next few days.

Thanking you in advance for your prompt attention to this matter, and with kindest regards, we are,

Yours truly,

VIRGINIA-CAROLINA LUMBER CO."

AUGUST 26, 1905.

Va. Carolina Lumber Co.

GENTLEMEN: Your favor of the 24th to hand in reference to car #22385. You will recollect that we wrote you on the arrival of this car, that we would not accept it at any price, and it was here subject to your order. The fact of the matter is, that this lumber is not worth the freight we paid on it. It is without any exaggeration the meanest, commonest, no account lumber we ever beheld, and what hasn't broken up and blown away in the four months that

23 is has been exposed to the elements, is still here for your inspection and removal, if you want it.

We consider we are out of pocket in the freight we paid for it.

We are, however, willing to call the matter square.

If this is not satisfactory the only alternative will be to pay us the charges amounting to \$104.44 and take the trash away.

Very truly yours,

EISINGER BROS.
W. G. E."

"AUGUST 30, 1905.

Messrs. Eisinger Bros., Washington, D. C.

GENTLEMEN: Your favor of the 26th received and noted, in reference to car #22385. We were in hopes by holding this matter open you would be able to find us a customer for this stock. We have shipped over 1,000,000 ft. of this sheathing to other parties in your market this year, at about the same prices as this car, and we have had absolutely no complaint whatever about same.

Our other customers seemed to know exactly what they were getting and at the prices no doubt considered it a bargain, and made money out of it, otherwise it is certain that they would not

24 have handled it. A member of our firm will be in your city within the next few days and will arrange disposition for this stock.

Of course we do not consider your offer of giving you the lumber for the freight, although we would almost be doing so at the original price at which it was sold, as you will note that it nets us very little.

Yours truly, VIRGINIA-CAROLINA LUMBER CO."

" SEPTEMBER 16, 1905.

Messrs. Eisinger Bros., Washington, D. C.

GENTLEMEN: Referring again to car 22385 sheathing shipped you, we have had this up with one of our friends in Washington, and are advised that owing to the fact that you have had this in your yard he would have some difficulty in interesting other parties in same, as they would seem to think that they are interfering with your business. We therefore write to ask you if you are in a position to make us a reasonable offer for this stock; if not, please advise what will be the cost of re-loading same and we will reship it to another point, of course refunding you the amount of freight which you have paid. We will of course very much prefer to dispose of the stock to you if we can do so on a reasonable basis. We have shipped probably a million feet of this same stock to other customers in Washington, and have never had any complaint on same, and we are very sorry that you did not refuse to unload the car on arrival, and we could have turned it over to other parties to whom we have been selling the stock without kick or complaint; but if you will refer to the correspondence, it seems that you accepted and unloaded this car making your complaint afterwards. Of course we are not kicking about this, as we always stand ready and willing to make matters right, still, we wish to impress you with the embarrassing position in which you have placed us about this shipment, and if you can consistently handle this stock at a reasonable price, we would very much prefer it. Please let us hear from you on the subject at your earliest convenience.

25

Yours truly, VIRGINIA-CAROLINA LUMBER CO."

" SEPTEMBER 22, 1905.

Va. Carolina L. Co.

GENTLEMEN: Your favor of the 16th to hand in reference to car of firewood which you will insist upon calling sheathing and which you have tried to convince us you could get some one else to use; We have said it before and we say it again that there is not a sane person in these broad United States who ever had as much as 3 months' experience in the lumber business who would give you \$5.00 per 1000 feet for this kind of stuff.

26 It is absolutely nothing but slabs run through a planer, and any mill that ship- out this kind of stock is entitled to no sympathy, but all the embarrassment and loss such proceedings call for.

This stuff has been laying around here for the past 5 months and yet no one from your firm has ever been near us, notwithstanding that your representative has, to our knowledge been right here in the town once if not oftener.

This matter could have been settled in five minutes if one of you had come here and seen this material with your own eyes, instead of standing off 2 or 3 hundred miles and telling us what other people did, and what you did to other people.

To get this matter settled once and for all, we will do what we don't think any one else under the same circumstances would give you, and that is we will allow you \$5.00 per 1000 feet for it, or rather we will allow you \$1.00 per 1000 over the amount of freight paid on it. If this meets with your views we will send you our c'k for \$16.43 and the fr't bill and call it square.

Yours truly,

EISINGER BROS.
W. G. E."

"SEPT. 23, 1905.

Messrs. Eisinger Bros., Washington, D. C.

GENTLEMEN: Your favor of the 22d received in reply to ours of 16th and we are very much surprised at the tone of same, and under the circumstances we think it entirely uncalled for. This stock was shipped from our own mill at Sumter and we have
27 been readily selling it without complaint in your city, as well as elsewhere, and at about the same price at which the stock was sold to you.

Now to be brief, we are willing to refund you the amount of freight and charges, provided you will reload the lumber in the car. You had absolutely no right to unload this lumber if it was not satisfactory without first getting our permission to do so, and in case you are not prepared to reload it, we shall insist upon settlement as per our invoice. It is absolutely absurd to talk of accepting your offer, which is unreasonable. All we ask is that you reload the lumber and we wil gladly relieve you of same. As a matter of fact unless this has become very seriously damaged, which it should not have done if you have taken proper care of it, we can probably get more money for the stock elsewhere than the price at which it was sold to you, owing to the advance in the market. We will ask that you please reply to this letter promptly.

Our representative was in Washington and expected to call to see you, but his time up to Saturday night was taken up by other matters and he was unable to see you. We do not mean to have any unpleasantness about the matter, but we do not think your letter is treating us as you would like to be treated if the situation were reversed.

Yours truly,

VIRGINIA-CAROLINA LUMBER CO."

28

"SEPT. 28, 1905.

Messrs. Eisinger Bros., Washington, D. C.

GENTLEMEN: We are without reply to our letter of 23rd in regard to the carload of sheathing.

Now in your first letter you made absolutely no claim as to deduction, and certainly did not lead us to believe that there would be any, and we certainly had every right to expect that if you should claim a deduction, it would be on the basis of \$11.50, which you admitted at the time the stock was worth. In view of the advance in the market, we thought no doubt that you would be able to handle the stock without any deduction whatever from our invoice price. We were willing to leave this matter largely in your hands, feeling that you would treat us right in the matter, and regret to say that the position you have taken has been a surprise to us. Had you not unloaded this car, we had other customers in Washington whose orders we had booked at the time for the same stock, to whom we could have turned it over, but feeling that you would treat us fairly in the matter, and after unloading it, there was hardly anything to do but to leave it with you. We shall, however, expect you to either pay our invoice price for the lumber, or return the full quantity free from damage f o b car, as you had no right to unload same without either expecting to pay our full price or load it back. We will ask that you please give this matter your immediate attention, as we desire it closed without further delay.

29 Yours truly, VIRGINIA-CAROLINA LUMBER CO."

"OCT. 3, 1905.

Messrs. Eisinger Bros., Washington, D. C.

GENTLEMEN: Will you please let us hear from you in regard to the carload of sheathing, as we desire to close this matter up without further delay. We will appreciate your prompt reply in the matter so we may know what to do.

Yours truly, VIRGINIA-CAROLINA LUMBER CO."

"OCT. 13, 1905.

Messrs. Eisinger Bros., Washington, D. C.

GENTLEMEN: We are still without reply to our several letters in regard to A C L car #22385. As previously advised, if you had not unloaded this stock, we could very easily have turned it over to other parties in Washington at the same price at which it was sold to you. In fact, had at the time a standing order from another firm for all of this stock that we could supply. Owing to the advance in price we think we could now dispose of it at a better price than it was sold to you, provided you have not permitted it to become damaged

30 aged and would reload it in the car in as good order as you received it. If you will do this, we shall be perfectly willing to take back the stock, otherwise, we shall expect you to pay for the same as invoiced. We think we have done more than our part in trying to reach a fair settlement of this matter, and will be glad to

have your advice on the subject. All we want is fair treatment, but we do want fair treatment, and expect to insist upon it in all cases.

Yours truly, VIRGINIA-CAROLINA LUMBER CO."

No reply to this letter was sent by the defendants to the plaintiff.

Witness further testified that the said lumber has not been reloaded and had remained in defendant's lumber yard on Brightwood Avenue near Florida Avenue since the time of its unloading from the car and what had not been destroyed was there still, and he had paid as freight on the said lumber the sum of \$67.47, and that a reasonable storage for the said lumber amounted to thirty cents per thousand feet per month for fifteen months, or a total of \$73.94.

The defendants then had sworn in their behalf as witnesses Charles Walker and Charles W. Keiffer who testified that they had examined the lumber in question, and that it was a very low grade of lumber and of little or no value. They could not state whether it was common sheathing or not.

Whereupon the defendant rested.

The defendants' counsel then moved the court to instruct the jury to render a verdict for the defendants for the freight paid and
31 storage charges as claimed in the defendants' pleading.

The plaintiff's counsel objected to granting the said motion on the following grounds:

1. The offers made by the defendants to plaintiff in letters of April 28, 1905, were never accepted by the plaintiff.

2. That if there had been an acceptance of the offer as shown by the correspondence, it had been done at such a late date that the offer made by the defendants on April 28th had lapsed, and by the expiration of a reasonable time that the acceptance of the defendants' offer by the plaintiff, if any, must then become a new offer which needed a new acceptance, and that the question of a reasonable time for acceptance was a question for the jury under proper instructions from the court.

3. That there was no meeting in the minds of the parties as to a *recision* of the original contract or the taking back of the lumber, the correspondence merely showing that there was an attempt on the part of both plaintiff and defendants to amicably adjust the matter, they coming to no terms about it; that the question of whether or not the minds of the parties met in an agreement by which the plaintiff was to take back the lumber was a question for the jury to determine, and that the court could not undertake to find as a matter of fact whether the minds of the parties met, this not being clear from the correspondence or the testimony.

4. That the court could not consider the letters in this case as being an agreement by the plaintiff to take back the lumber, the plaintiff's letters showing on their face that they expected a
32 reply consenting to the conditions named therein, which conditions had never been accepted by the defendants.

5. That the court could not interpret the letters in this case as being an agreement for the *recision* of the contract of sale.

6. That in any aspect of the case, the court could not instruct the

jury on the question of freight, since, if there was a mutual agreement to rescind and for the plaintiff to take back the lumber, there was no agreement to pay freight and storage charges.

The court after consideration of the motion of the defendant, granted same in part as hereafter appears: to which ruling the plaintiff then and there excepted and prayed the justice to note said exception on his minutes, which was allowed and done and said exception is hereby made of record herein.

That the plaintiff assigned as reasons for the said exception the reasons hereinabove stated in opposition to said motion.

Thereupon the court instructed the jury that they should render a verdict for the defendant in the sum of \$67.47 freight, to which the Plff. excepted, but left to the jury the question of whether or not the defendant was entitled to storage.

Whereupon the jury retired and returning rendered a verdict in favor of the defendants for \$67.47.

And the plaintiff prays the justice presiding at the trial to sign and seal this his bill of exceptions, which is accordingly
33 done now for then this 21st day of December, A. D., 1906.

DAN THEW WRIGHT, *Justice*. [SEAL.]

Order for Transcript on Appeal.

Filed January 3, 1907.

In the Supreme Court of the District of Columbia the 3rd Day of January, 1907.

At Law. No. 48696.

VIRGINIA CAROLINA LUMBER CO.

vs.

FRANK J. EISINGER ET AL.

The Clerk of said Court will please prepare transcript on appeal to include declaration, particulars of demand, pleas, replication, bill of exceptions, memo. of verdict and judgment, mem. of appeal bond, order on bill of exceptions.

H. WINSHIP WHEATLEY,
Attorney for Plaintiff.

Memorandum.

January 3, 1907.—Time to file transcript of record in Court of Appeals extended to January 23, 1907.

34 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia*, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 33 inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 48,696 at law, wherein Virginia Carolina Lumber Company, a corporation, is Plaintiff and Frank J. Eisinger and Walter G. Eisinger, co-partners trading as Eisinger Brothers, are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hercunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 10th day of January, A. D., 1907.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk*.

Endorsed on cover: District of Columbia supreme court. No. 1750. Virginia-Carolina Company, a corporation, appellant, vs. Frank J. Eisinger *et al.* Court of Appeals, District of Columbia. Filed Jan. 14, 1907. Henry W. Hodges, clerk.

